IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 8, 2005

# STATE OF TENNESSEE v. JESSE ROSS SMITH

**Direct Appeal from the Circuit Court for Bedford County**
**No. 15453 William Charles Lee, Judge**

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**No. M2004-01372-CCA-R3-CD - Filed June 21, 2005**

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The appellant, Jesse Ross Smith, pled guilty in the Bedford County Circuit Court to aggravated robbery, aggravated assault, possession of a prohibited weapon, and driving on a revoked license. Pursuant to the plea agreement, the trial court was to determine the length of the sentence. After a sentencing hearing, the trial court ordered an effective twenty-six-year sentence in the Department of Correction (DOC). On appeal, the appellant claims the trial court improperly enhanced his sentences in light of Blakely v. Washington, 542 U.S. ___, 124 S. Ct. 2531 (2004), and improperly sentenced him as a Range II offender. Upon review of the record and the parties' briefs, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed.**

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and J. C. MCLIN, JJ., joined.

Gregory D. Smith, Clarksville, Tennessee, and Andrew Jackson Dearing, III, Shelbyville, Tennessee, for the appellant, Jesse Ross Smith.

Paul G. Summers, Attorney General and Reporter; and Renee W. Turner, Assistant Attorney General; William Michael McCown, District Attorney General; and Michael D. Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### I. Factual Background

This case relates to the appellant's robbing an undercover drug agent on October 29, 2003. At the appellant's guilty plea hearing, the state gave the following factual account of the crimes: On October 29, drug task force agents met with a confidential informant to discuss purchasing marijuana from the appellant. The informant told the agents that he could purchase a quarter pound of the drug from the appellant for $300. The informant telephoned the appellant, and they agreed to meet at a

location in Shelbyville. Undercover Agent Bill Osterman and the informant met the appellant in a convenience store parking lot and agreed to follow the appellant to a more remote location. There, the appellant pulled a sawed-off shotgun out of his car, pointed it at Agent Osterman and the informant, and ordered Agent Osterman to throw his money on the ground. The agent threw $300 on the ground, and the appellant picked up the money. Other drug task force agents arrived and arrested the appellant. The appellant pled guilty to aggravated robbery against Agent Osterman, a Class B felony; aggravated assault against the informant, a Class C felony; possession of a prohibited weapon, a Class E felony; and driving on a revoked license, a Class B misdemeanor.

At the sentencing hearing, Agent Osterman testified that he worked for the Seventeenth Judicial District Drug Task Force and participated in an undercover operation involving the appellant. He acknowledged that while posing as a person trying to buy drugs from the appellant, the appellant pointed a sawed-off shotgun at him and ordered him to throw his money on the ground. The appellant then ordered him and the confidential informant to lie on the ground and cover their heads. Agent Osterman testified that he was in fear for his life.

No other witnesses testified at the sentencing hearing. However, the state introduced the appellant's presentence report into evidence. According to the report, the then twenty-three-year-old appellant dropped out of high school in the ninth grade but obtained his GED. The report shows that the appellant worked for D & R Painting for two months in 2002 and Calsonic for one and one-half months in 2002. However, the appellant was fired from Calsonic for missing work repeatedly. The appellant reported being in good physical and mental health but stated that he began smoking marijuana when he was thirteen years old and using cocaine when he was sixteen. He also stated that he smoked marijuana daily and used cocaine several times per week before he was arrested for the crimes in question. The report shows that the appellant has an extensive criminal record, having prior convictions for aggravated burglary, evading arrest, possession of a weapon with the intent to go armed, criminal trespassing, contributing to the delinquency of a minor, vandalism, and speeding. In addition, the report reveals that the appellant has an extensive juvenile record, having juvenile adjudications for aggravated burglary, burglary, assault, theft of property under $500, theft of property under $1,000, and vandalism. According to the report, the appellant was on probation and parole when he committed the instant offenses.

The trial court applied enhancement factors (2), that the appellant has a "previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range"; (9), that the appellant "has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community"; (14), that the appellant committed the felonies while on parole and probation; and (21), that the appellant "was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult." See Tenn. Code Ann. § 40-35-114(2), (9), (14)(B) & (D), (21). In mitigation, the trial court applied mitigating factor (13) on the basis that the appellant pled guilty. See Tenn. Code Ann. § 40-35-113(13). The trial court held that the appellant was a Range II offender and ordered that he serve eighteen and one-half years for the aggravated robbery conviction, seven and one-half years for the aggravated assault conviction, two years for the possession of a prohibited weapon conviction, and

six months for the driving on a revoked license conviction. The trial court also determined that the appellant was a dangerous offender and ordered that he serve the aggravated assault, possession of a prohibited weapon, and driving on a revoked license sentences concurrently to each other but consecutively to the aggravated robbery sentence for an effective sentence of twenty-six years in the DOC. See Tenn. Code Ann. § 40-35-115(b)(4).

## II. Analysis

The appellant claims that the trial court improperly applied two enhancement factors to his sentences in light of Blakely v. Washington, 542 U.S. ___, 124 S. Ct. 2531 (2004), and that he was improperly sentenced as a Range II offender because the state failed to file an adequate notice of intent to seek enhanced punishment as required by Tennessee Code Annotated section 40-35-202(a). The State argues that the trial court properly sentenced the appellant. We agree with the State.

Appellate review of the length, range, or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. § 40-35-102, -103, -210; see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentences. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

### A. Blakely

The appellant was convicted of Class B, C, and E felonies. To begin a sentencing determination regarding Class B, C, and E felonies, a court should begin at the presumptive minimum, then "enhance the sentence within the range as appropriate for the enhancement factors, and then reduce the sentence as appropriate for the mitigating factors." Tenn. Code Ann. § 40-35-210(e). The presumptive sentence for Class B, C, and E felonies is the minimum sentence within the appropriate range. See Tenn. Code Ann. § 40-35-210(c). The appellant was sentenced as a Range II, multiple offender. Accordingly, the presumptive sentence was twelve years for the Class B felony, six years for the Class C felony, and two years for the Class E felony. See Tenn. Code Ann. § 40-35-112(b)(2), (4), (5). The trial court applied four enhancement factors to the appellant's sentences. In light of the Blakely decision, the appellant claims the trial court improperly applied enhancement factor (9), that he "has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community," and (14), that he committed the felonies while on parole and probation.

The United States Supreme Court released Blakely after the appellant's sentencing hearing. In Blakely, the Supreme Court held that

> the "statutory maximum" for Apprendi [v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000),] purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.

Blakely, 542 U.S. at ___, 124 S. Ct. at 2537. Blakely did not dispute the appropriateness of a trial court's application of enhancement factor (2), which is based on the existence of a defendant's prior criminal history, but called into question the constitutionality of the application of the remainder of our statutory enhancement factors without such facts being found by a jury or admitted by an appellant.

However, our supreme court recently held that Blakely does not announce a new rule of law and that the "Tennessee Criminal Sentencing Reform Act does not authorize a sentencing procedure which violates the Sixth Amendment right to jury trial." State v. Edwin Gomez, No. M2002-01209-SC-R11-CD, 2005 Tenn. LEXIS 350, at *45 n.16 (Tenn. Apr. 15, 2005). Moreover, the supreme court concluded that any Blakley issue not raised in the trial court is waived. Id. Given the dictates of Gomez, the appellant's reliance on Blakely must fail.

In any event, even if the trial court had improperly applied enhancement factors under Blakely, we believe the appellant's enhanced sentences would be appropriate. According to Blakely, the trial court can properly apply enhancement factor (2) to an appellant's sentences. In this case, the appellant has a long history of adult convictions. He also has admitted using cocaine and marijuana regularly. Thus, enhancement factor (2) applies, is entitled to substantial weight, and warrants the sentences determined by the trial court.

B. Range II Offender

Next, the appellant claims the trial court improperly sentenced him as a Range II offender because the state failed to file an adequate notice of intent to seek enhanced punishment as required by Tennessee Code Annotated section 40-35-202(a). The state claims that this issue is without merit because the appellant waived notice and agreed to be sentenced as a Range II offender as part of his plea agreement. We conclude that the trial court properly sentenced the appellant as a Range II offender.

As noted by the State, the following condition appears in the appellant's written guilty plea:

> My attorney has explained enhanced sentencing to me, and I understand that if I am presently eligible for enhanced sentencing, I have a statutory right to a delay of ten (10) days after the State files a notice of intent to seek enhanced punishment before the Court accepts my plea of "GUILTY". I hereby acknowledge that I am subject to enhanced sentencing as a multiple, persistent and/or career criminal, and give up my right to the filing of such notice and/or to some or all of the ten (10) day waiting period before conviction.

At the appellant's guilty plea hearing, the State told the trial court that "the defendant has been put on notice that the State alleges that he is a Range II offender." The appellant's attorney did not object to Range II sentencing or ask for a continuance. See State v. Gilmore, 823 S.W.2d 566, 570-71 (Tenn. Crim. App. 1991) (holding that in the absence of a defense motion for continuance, any objection to the late-filed notice is waived). The trial court then explained to the appellant the sentencing ranges for each offense as a Range II offender. The appellant told the trial court that he understood the ranges and pled guilty. In light of these facts, we hold that the appellant agreed to be sentenced as a Range II offender and that he is not entitled to relief. See Hicks v. State, 945 S.W.2d 706, 709 (Tenn. 1997) (holding that questions concerning the range classification of a defendant may be waived by a knowing and voluntary guilty plea); see also James Gordon Coons v. State, No. 01C01-9801-CR-00014, 1999 Tenn. Crim. App. LEXIS 450, at *15 (Nashville, May 6, 1999) (noting that a defendant can waive notice of enhanced punishment pursuant to Tenn. Code. Ann. § 40-35-202(a)).

## III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgments of the trial court.

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NORMA McGEE OGLE, JUDGE